No. 11956

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN CALIFORNIA FISHERMANS ASSOCIATION, *et al.*,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANTS.

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The Myers Legal Press, Los Angeles. Phone, VAndike 2007

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BRIEF OF APPELLANTS.

Jurisdiction.

This is an appeal from a final Judgment and Decree of Condemnation of the District Court of the United States for the Southern District of California, Central Division, entered on April 13, 1948 [R. 27-30] awarding appellants certain sums as compensation for property taken by the appellee under its power of eminent domain.

The Trial Court made Findings of Fact and Conclusions of Law [R. 20]. No written opinion was rendered.

The District Court had jurisdiction under the provisions of the Act of August 1, 1888 as amended (25 Stat. 357, 40 U. S. C. 257).

This Court has jurisdiction of this appeal under the provisions of 28 U. S. C. 1291 and 1294(1) and Rule 81(a)(7), Federal Rules of Civil Procedure.

Statement of the Case and Questions Involved.

Facts.

Shortly after Pearl Harbor the Navy Department of the United States found it necessary to acquire facilities on certain lands in Los Angeles Harbor known as Terminal Island [R. 3, 8]. The Appellants all had certain interests in the land thus taken [R. 9, 21] which interests, except as to the value thereof, the Appellee recognizes [R. 9]. In its complaint the Appellee sought to condemn each and every estate and interest in the land taken [R. 11, 12].

The particular properties owned by each Appellant consisted of buildings, residences, and improvements made by them to the land, securely attached thereto and of a permanent and substantial nature [R. 22, 78]. These buildings and structures varied as to each parcel and as to each Appellant but in general they consisted of dwelling houses, meeting halls, office buildings, stores, and the usual sheds and garages that go therewith [R. 35 *et seq.*].

The Appellants occupied the land in question and constructed the buildings thereon following their entry on the

land under so-called "Revocable Permits" given them by the City of Los Angeles [R. 15],[1] the owner of the fee [R. 21, 22]. Under these permits, Appellants had the right to and did construct the permanent improvements [R. 21, 22], and said improvements were solely the property of Appellants [R. 22].

There are 14 Appellants and 15 parcels of land, one Appellant, T. Koiso, owning two of the parcels [R. 23]. The land and buildings occupied by the Appellants at the time of the taking were all part of a then thriving community [R. 89]. Each of the Appellants had occupied the land under these revocable permits for many years; some as long as 18 years [R. 35, 54], and none for any shorter time than 3 years [R. 21].

On various dates prior to February 21, 1942, but in each case less than thirty days prior thereto, at the request of the United States Navy Department [R. 16, 22, 23], the City of Los Angeles cancelled all the revocable permits and ordered Appellants to remove themselves and their improvements from the land within 30 days [R. 15, 22]. Before the 30 day periods had expired and again at the request of the United States Navy Department [R. 22, 23], Appellee instituted this action, obtained an

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[1]The "Revocable Permits," a copy of which was attached to the Stipulation of Facts [R. 16, 17], do not appear in the printed records. They provided, however, *inter alia,* that the City of Los Angeles could revoke the permits on 30 days' written notice and that the Appellants could construct and would own the improvements. [R. 21, 22.]

order for immediate possession of Appellants' property, took possession of said property and removed Appellants therefrom forthwith [R. 15, 22]. Appellee also at the same time took possession of the land belonging to the City of Los Angeles on which Appellants' property was located [R. 4, 5, 11, 16].

Appellants were unable by reason of their removal to remove their structures and improvements [R. 23] and they are no longer present on the land [R. 16].

At the trial the parties differed as to the theory of evaluation that should be applied. Appellees claim, and the trial court agreed, that the proper theory is the value of the buildings, separately considered, without regard to and as removed from the land [R. 25]. Appellants claim that the proper theory is the value of the buildings as a part of the land [R. 79, 80, 89].

However, the parties agreed on the actual figures as to the evaluation on either theory [Joint Exhibit 1, R. 35 *et seq.*][2] and the trial court made findings as to the valuation on both theories [R. 23].

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[2]In this Joint Exhibit, the value as a part of the land is referred to as "Valuation of Improvements in Place" and the value as removed from the land is referred to as "Removal or Salvage Value of Improvements." [*E.g.* R. 36.]

Questions Involved.

1. Where there is more than one owner of real property and the Government takes all the interests therein, in awarding just compensation to the owner of the buildings and improvements taken, should the evaluation be for the property as a "whole" leaving to the parties whose property is taken, or to the court if the parties cannot agree, to decide their respective interests in the award, or should the award be made piecemeal of the respective interests without regard to the enhanced value given each interest by reason of the presence of the component interests which go to make up the entirety of the property taken?

2. Where the Government condemns all of the interests in the real property and an occupier of land owns improvements thereon which are of such permanent nature that they are a part of said real property and have a value by reason of their being a part of it, can the United States Government avoid paying that value to the owner of the improvements by causing the owner of the fee to cancel the occupier's permission to remain on the land, and then just pay the value of the improvements separate and apart from the land?

Specifications of Error.

1. The Trial Court erred in adopting the theory of evaluation as the value of the property as removed from land.

2. The property should have been evaluated on the theory of the "whole" and appellants awarded compensation for their property as a part of the land.

ARGUMENT.

Summary.

When all of the interests in land are taken under eminent domain, the Government has no concern as to the value of the respective interests but must pay for all that it takes leaving it to the parties or to the court to settle the value of the respective share of each interest in the total award.

The buildings of Appellants were real property. When the condemnor takes buildings which are in reality real property, it must pay for them at the real property value and it cannot be the beneficiary of any private agreement between the landlord and tenant as to the nature of those buildings.

The Government cannot, by a maneuver, force a termination of a landlord-tenant relationship and then take advantage of its own act by claiming that the landlord-tenant relationship having been terminated, the tenant has no interest in the land but owns only bare boards. The amount of the interest of the tenant is of no concern to the condemnor.

I.

The Property Taken by Appellee Must Be Valued on the Theory of the "Whole."

The problem presented to this Court for decision is a simple one, but, unless faulty reasoning is to be indulged in and just compensation not given, the specific facts of the case must ever be borne in mind. The problem is as to what theory of evaluation should be followed where permanent buildings on land, in other words—real property—is owned by one person, the land itself is owned by another, and the government takes both interests.

A. The Rule Applicable Where the Land and Buildings Are Owned by One Person.

At the outset, it is clear that had the buildings and the land been owned by one person, the total amount of the value of these two interests, as each increases or decreases the value of the other, would have to be paid by the Appellee to the owner thereof.

> 1 *Nichols on Eminent Domain* (2d Ed) 693:
>
> "When a tract of land, upon which buildings have been erected and affixed to the soil so far as to become part of the real estate, is taken by eminent domain, unless some special provision is made for the removal of the buildings, the value of the buildings must be considered in determining the compensation to be awarded to the owner; . . .
>
> ". . . In the ordinary case the cost of removing the buildings is almost if not quite equal to the value of the materials, and the owner is entitled to

recover the full value of the buildings. He is not however, entitled to have the buildings valued as they stand on the land as separate items additional to the market value of the land, *nor* on the other hand *is the condemning party entitled to have the buildings valued apart from the land merely as for the purpose of removal . . .*" (Italics added.)

2 Lewis, *Eminent Domain* (3d Ed.) 1269:

"Ordinarily buildings are a part of the land and when land is taken for a public use the buildings and structures thereon are taken with it and the whole must be paid for. *They are to be valued as a part of the realty and not merely for the materials they contain or what they are worth for removal.*" (Italics added.)

Accord:

United States v. General Motors, 323 U. S. 373;

Jackson v. New York, 213 N. Y. 34, 106 N. E. 758;

In re Postoffice Site in Burrough of the Bronx, 210 Fed. 832 (C. C. A. 2, 1914);

Banner Milling Co. v. State, 240 N. Y. 533, 148 N. E. 668;

City of Los Angeles v. Klinker, 219 Cal. 198, 25 P. 2d 826.

B. The Same Rule Is Applicable Where There Are More Than One Interest in the Land Taken and the Condemnor Takes All of Those Interests.

The question then, is the simple one: Is there a different rule where the ownership of these interests is divided, or does the same rule of evaluation apply as between condemnor and condemnees leaving to the latter or to the court to determine the latter's respective shares in the award?

Appellants submit that the same rule of evaluation applies, especially in this case where it was the act of the condemnor itself which caused the cessation of the landlord-tenant relationship between the appellants and the City of Los Angeles [R. 16, 23]. Particularly is this rule applicable where the appellants' homes and businesses had been on this land for, in some cases, as long as 18 years [R. 35, 54] and presumably would have continued indefinitely had not this condemnation taken place. But irrespective of these special considerations, the rule contended for by Appellants, as will be shown *infra,* is the correct one. Indeed the Trial Court itself was not too satisfied that it had ruled properly and said: "I am not so sure that I am correct in that (removal value) ruling" [R. 103]. Appellants submit that their position is the proper one and the one which affords just compensation, while that of the appellees and of the lower court is unreasonable, unjust, and contrary to the authorities.

The principle is well established that:

> "A condemnation proceeding is an *in rem* proceeding and when land is taken in which separate interests or estates are owned by two or more persons, as between the public and the owners, it is regarded as one estate. One award as just compensation for the entire value of the land is made and it stands in place of the property appropriated as the quivalent thereof. The distribution of the award between the owners of separate interests or estates is a matter wholly between them and the public is not concerned therewith." (Citing many cases.)
>
> *Bogart v. United States,* 169 F. 2d 210, 213 (C. C. A. 10, 1948).

The Appellee, United States, cannot blow both hot and cold. It cannot claim in one case, when it is advantageous so to do, that the proper theory is the valuation as a whole, and then in another identical case, again, when it is advantageous so to do, that that theory has suddenly become improper.

In *Eagle Lake Improvement Co. v. United States,* 160 F. 2d 182 (C. C. A. 5, 1947), the United States properly contended for and the trial and appellate courts followed the theory of the value of the whole. In that case the question was presented as to:

> "Whether, when land upon which there are outstanding mineral leases is condemned in fee simple, it is error to admit testimony of the market value of the property as a whole without separating such testimony into mineral value and surface value; . . ."

Answering that question in the negative, the court said (160 F. 2d at 184):

> "There is no merit in the contentions of appellants (condemnees) that the owners of mineral interests were entitled to a separate trial and that evidence of the market value of the property as a whole was not admissible. A condemnation proceeding is an action *in rem*. It is not the taking of rights of designated persons, but *the taking of the property itself*. Duckett & Co. v. United States, 266 U. S. 149, 151, 45 S. Ct. 38, 69 L. Ed. 216. When property is condemned, the amount paid for it stands in the place of the property and represents all interests in the property acquired. United States v. Dunnington, 146 U. S. 338, 350, 353, 13 S. Ct. 79, 36 L. Ed. 996. The sum determined to be due for the taking is apportioned between the claimants, but, 'as between the condemner and the condemnee, the property is valued as a whole.' State of Texas v. Harris County, etc. Navigation District, 5 Cir., 158 F. 2d 861, 865; Meadows v. United States, 4 Cir., 144 F. 2d 751; Silberman v. United States, 1 Cir., 131 F. 2d 715; cf. City of Waco v. Messer, Tex. Civ. App., 49 S. W. 2d 822."

Accord:

> *United States v. 19,573.59 Acres of Land*, 70 Fed. Supp. 610, 612 (D. C. Neb. 1947).

There is no reason or justification for Appellee to claim that a different rule should be followed in the case at bar.

Appellee has fallen into error in the instant case because it has forgotten that it condemned *all* the interests in the real property here involved and not merely the interests

of the Appellants. Had the latter been the case, a totally different rule might be applicable.

The distinction is succinctly illustrated in the case of *Messer v. United States,* 157 F. 2d 793 (C. C. A. 5, 1946). That case was decided by the same court that decided the *Eagle Lake* case, *supra.* The two cases, taken together, point up the two different principles to be applied depending upon the facts before the court. In the *Messer* case the government condemned only the interest of the licensee and not the interest of the owner of the fee. In awarding the compensation to the condemnee licensee for her loss of the buildings she was unable to remove, the trial court permitted the jury to take into consideration the fact that the condemnee would have incurred certain expenses of removal had she been permitted so to do. The Appellate Court held this was proper and in answer to condemnee's argument that she was entitled to a valuation of the buildings as a part of the land and valued as a part of the whole said (157 F. 2d at 785, note 5):

> "The argument of appellant fails to distinguish between the condemnation of all interests in property and the condemnation of some of the interests. Where the case is the former, the Government is interested in the award of a lump sum for all the interests taken, and not in the division of the lump sum among the owners of the interests. See United States v. 25,936 Acres of Land in Borough of Edgewater, 1946, 3 Cir., 153 F. 2d 277. Where, as here, the Government settles with the owner of one interest, the question of compensation for all interests is irrelevant; only the question of just compensation for the interest taken concerns the Government."

Thus it is established that where, as here, the Government has taken all the interests, it was error for the trial court to fail to evaluate on the basis of all the interests taken.

C. The Relationship Between the City of Los Angeles, as Owner of the Fee, and the Appellants, as the City's Tenants Is of No Concern to the Appellee as Condemnor.

In determining the value of property taken by eminent domain the condemnor and condemnees stand in the relationship of vendor-purchasers and not landlord-tenant.

> *City of Los Angeles v. Klinker*, 219 Cal. 198, 25 P. 2d 826;
>
> *Cf. R. Barcroft & Sons Company v. Cullen*, 217 Cal. 708, 20 P. 2d 665.

As a third party vendee, therefore, Appellee cannot take advantage of any private agreement as between the landlord and tenant as to the nature of the property, nor can Appellee do this by a separate settlement with the City [R. 16]. The property taken was real property and must be paid for as such.

This principle is established by many cases.

In *United States v. Seagren*, 50 F. 2d 333, 335 (C. C. D. C. 1931), the court said:

> "So, in this case, we are not dealing merely with a tract of land, but with the persons holding interests therein and the verdict as confirmed allows to the landlord and to the tenant the appraised value of each estate.
>
> "And so the agreement for removal made by these parties at another time, for another purpose, and af-

fecting no interests but their own, must be rejected here as irrelevant, when set up by the United States to control its condemnation proceedings against the tenant's interest in the land . . .

". . . the United States contends that the tenant here has lost nothing by the taking of the property.

"He reserved the right to remove his structures whenever the landlord terminated his tenancy; now that the United States has terminated his tenancy by taking the land, he may exercise his right and remove his structures.

"Nothing has been taken from him. Only his performance of an inevitable obligation has been accelerated.

"But much the same argument could be made in support of murder, for all that any murderer ever did was to accelerate the debt that every mortal owes to nature.

"If the structures here in question had been built by the landlord, they would have been taken and paid for by the government without question, as the government concedes they are now part of the realty. *Is the tenants' reserved power of removal as against the landlord's termination of the lease to work a forfeiture in favor of the government? We think not.*

"The inherent character of the structures is real estate; no agreement can change the character, though the landlord may waive the right which might otherwise accrue to him from the character of the structures placed upon the land . . .

"We find the controlling rule well stated in Nichols on Eminent Domain: 'It frequently happens that, in the case of a lease for a long term of years, the tenant erects buildings upon the leased land and puts

fixtures into the building for his own use. It is well settled that, even if the buildings or fixtures are attached to the real estate and would pass with a conveyance of the land, as between landlord and tenant they remain personal property, and, in the absence of special agreement to the contrary, may be removed by the tenant at any time during the continuation of the lease provided such removal may be made without injury to the freehold. *This rule is entirely for the protection of the tenant and cannot be worked by the condemning party.* If the buildings or fixtures are attached to the real estate, they must be treated as real estate in determining the total award, but in apportioning the award they are treated as personal property and credited to the tenant.' " Nichols on Eminent Domain (2d Ed. Vol. 1, §234.) (Italics added.)

In *City of Los Angeles v. Hughes,* 202 Cal. 731, 262 Pac. 737, the property in question was owned by Fred T. Hughes who had leased the property to Hoover Nursery Company for the purpose of operating a nursery. The City sought to condemn the property. The lease to the Hoover Nursery Company provided that the lessee had the privilege of growing and selling nursery stock. The Court said that (p. 737):

> "It has often been held that property affixed to land which, as between the parties shall be deemed to be personal property, still retains its natural character of realty as to third persons."

The court determined that the Hoover Nursery Company had an additional interest in the real property sought to be condemned to the extent that it was the owner of

the trees and shrubs planted and growing on the land, that these constituted an interest in the land in the nature of an improvement and the lessee was entitled to compensation for this interest on the taking of the real property by the City and that compensation for this interest should go to the lessee, the Hoover Nursery Company, and not to the owners of the fee.

In *In re Allen Street and First Avenue,* 256 N. Y. 236, 243, 249, 176 N. E. 377, 379, 382, the court said in a case closely analogous to the instant one:

> ". . . In this case, the clause of the lease which provided for its termination upon the vesting of title to the land in the city evidences an agreement between landlord and tenant that the tenant shall receive out of the award *no compensation for his leasehold interest.* Even so, the tenant retains the right to compensation for his interest in any annexation to the real property which, but for the fact that the real property has been taken, he would have the right to remove at the end of his lease (citing cases). Towards the sovereign exercising the power of eminent domain, the agreement of the parties could have no effect and was not intended to have effect . . .
>
> "The city must pay the value of what it takes. To the extent that the value of the real property as a whole is enhanced by the fixtures annexed thereto, the value of the fixtures must be included in what the city pays, and the tenant is entitled to part of the award, not because the fixtures added to the value of the leasehold, but because they belonged to him and

their value enters into the value of what the city has taken." (Italics added.)

In *Carlock v. U. S.*, 53 F. 2d 926, 927 (C. C. D. C. 1931), the court holds:

"It is a fundamental principle, governing condemnation proceedings, where several interests are involved, such as estates for life or in remainder, or leasehold, or in reversion, in the property to be condemned, all should be combined in determining the value of the fee, after which the total value of the fee can be subdivided in satisfaction of the values fixed upon the various interests involved."

In *City of St. Louis v. Rossi,* 333 Mo. 1092, 1108, 64 S. W. 2d 600, 607, it was held:

". . . The rule they [commissioners] adopted for valuing improvements (difference between the cost of removal and the value of salvage) is not correct. They should find and allow, as damages for the land taken, the value of such land with the buildings thereon as a whole; that is what the land, improved as it was on March 26, 1919, was then worth. They should, therefore, as to buildings or other improvements affixed to the soil so as to become real estate, instead of valuing the land and buildings separately, consider the amount which such buildings add to the market value of the land taken and arrive at the value of the whole (injury to buildings on land not taken, if any, should be considered in connection with consequential damages) *without regard to who put the buildings there or the right to remove them.*

> These are matters to be considered when it comes to apportioning the damages between the owners and lessees, but do not concern the commissioners." (Italics added.)

And in *City of Ladue v. St. Louis Public Service Co.,* 1943 Mo. App. 168 S. W. 2d 966, 970, it was held that the tenant whose interest was ended and who could not remove the buildings

> "should not be limited to the salvage value, nor should her share of the award be reduced to the cost of moving the buildings. She was entitled to the market value of her buildings, ascertained on the basis of what they were worth for the use to which they were employed as they stood upon the land."

Other cases are cited in the footnote.[3]

Just as in *United States v. Welch,* 217 U. S. 333, 339,

> "the value of the easement cannot be ascertained without reference to the dominant estate to which it is attached,"

so here, the value of the improvements cannot be ascertained without reference to the land to which they are attached.

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[3]*People v. Church,* 57 Cal. App. 2d (Supp.) 1032, 136 P. 2d 139; *St. Louis v. St. Louis, etc., Ry. Co.,* 266 Mo. 694, 182 S. W. 750; *Mayor, etc., of Baltimore v. Latrobe,* 101 Md. 621, 61 Atl. 203; *cf. Burt v. Merchants Ins. Co.,* 115 Mass. 1, 15.

Conclusion.

The lower court erred in its theory of evaluation and in so doing deprived Appellants of just compensation for their property.

The judgment should be reversed and the lower court ordered to enter judgment based on the theory of the whole and to award Appellants compensation for their property as a part of the land.

Respectfully submitted,

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